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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-13-1171-TaKuJu
	)	
MOHAMMAD REZA SALEHI,	)	Bk. No. 12-26790
	)	
Debtor.	)	Adv. Proc. No. 12-02251
	)	
MOHAMMAD REZA SALEHI,	)	
	)	
Appellant,	)	
	)	
v.	)	MEMORANDUM*
	)	
GLOBAL AUTOMOTIVE GROUP, INC.,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on May 15, 2014  
at Sacramento, California

Filed - June 9, 2014

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Appearances: Sasha F. Ganji argued for appellant Mohammad Reza Salehi; Mark A. Serlin of Serlin & Whiteford, LLP, argued for appellee Global Automotive Group, Inc.

Before: TAYLOR, JURY, and KURTZ, Bankruptcy Judges.

\* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 **INTRODUCTION**

2 Appellant, chapter 7<sup>1</sup> debtor Mohammad Reza Salehi, appeals  
3 the bankruptcy court's summary judgment in favor of Global  
4 Automotive Group, Inc. ("Global Automotive")<sup>2</sup> denying Salehi's  
5 discharge under § 727(a) (3) and (a) (5). Because Global  
6 Automotive failed to demonstrate the absence of genuine disputes  
7 of material fact, we REVERSE.

8 **FACTS**

9 Salehi filed his bankruptcy petition on April 6, 2012, and  
10 obtained waiver of the filing fee.<sup>3</sup> He scheduled assets of  
11 \$2,150 and liabilities of \$1,137,949. The liabilities consisted  
12 of two judgments in favor of Tanl Investment Group totaling  
13 \$1,118,000, medical expenses, and unpaid utilities. Salehi  
14 disclosed that he had no current income, but that a few days  
15 prior to filing bankruptcy he reapplied for unemployment

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16 <sup>1</sup> Unless specified otherwise, all chapter and section  
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
18 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

19 <sup>2</sup> Salehi filed a motion in this appeal seeking, among other  
20 things, to quash all pleadings, motions, briefs, and legal  
documents filed on behalf of Global Automotive on the grounds  
21 that Global Automotive's corporate powers, rights, and privileges  
were suspended on December 3, 2013, by the California Franchise  
22 Tax Board for failure to remit taxes. A motions panel denied the  
motion after reviewing Global Automotive's opposition thereto,  
23 which included a Certificate of Revivor that resulted in  
reinstatement of Global Automotive's corporate rights, even to  
24 the extent of validating otherwise invalid prior proceedings.

25 <sup>3</sup> The excerpts of the record on appeal consist primarily of  
argument and incomplete excerpts of testimony taken outside this  
26 adversary proceeding. To facilitate our analysis and disposition  
of this appeal, we have drawn some of our facts from items  
27 referenced in the bankruptcy court's case docket. See O'Rourke  
v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955,  
28 957-58 (9th Cir. 1989) (appellate court may take judicial notice  
of the record in the underlying bankruptcy case).

1 compensation; his income in both 2010 and 2011 consisted solely  
2 of unemployment benefits. The chapter 7 trustee filed a no  
3 distribution report in May 2012.

4 Global Automotive, assignee of the two judgments against  
5 Salehi, examined him under Rule 2004 and thereafter filed a  
6 timely complaint seeking denial of his discharge pursuant to  
7 § 727(a)(3), (a)(4), and (a)(5). The complaint, which is barely  
8 three pages long, contains three, 2-sentence, substantive  
9 paragraphs:

- 10 • Paragraph 7 first paraphrases § 727(a)(3), which bars  
11 discharge based on the failure to keep or preserve recorded  
12 information regarding debtor's financial condition or  
13 business transactions, and then states: "Specifically,  
14 notwithstanding a Bankruptcy Rule 2004 subpoena and related  
15 examination on June 5, 2012, the Debtor did not and could  
16 not produce numerous financial and business records."  
17 Adv. ECF #1 at 2:11-13.
- 18 • Paragraph 8 first paraphrases § 727(a)(5), which bars  
19 discharge where a debtor fails to explain a loss of assets,  
20 and then states: "For instance, the Debtor cannot  
21 satisfactorily explain, and had few or no records to  
22 indicate, how and where tens of thousands of dollars of  
23 proceeds of automobiles owned by Debtor's corporation,  
24 Fulton Auto Depot, Inc. dba Sacramento Auto Plaza ("SAP")  
25 were expended." Id. at 2:15-18.
- 26 • In Paragraph 9, Global Automotive generally alleges that  
27 Salehi's testimony at the Rule 2004 examination contained  
28 false oath(s) or accounts within the meaning of

1 § 727(a)(4)(A), and then states: "Specifically, the Debtor  
2 testified falsely at his 2004 examination regarding the  
3 disposition of money and property of SAP and the proceeds  
4 thereof." Id. at 2:21-23.

5 Salehi answered the complaint, generally denying the  
6 allegations in paragraphs 7, 8, and 9. Thereafter, Global  
7 Automotive filed a Motion for Summary Judgment ("MSJ") nominally  
8 on all three of the alleged statutory grounds for denial of  
9 discharge set forth in the complaint.

10 In the MSJ, Global Automotive asserted that Salehi produced  
11 virtually no documents at the Rule 2004 examination and admitted  
12 that he kept no financial records. It also asserted that Salehi  
13 demonstrated conclusively that he had no documents or records of  
14 a car dealership that he owned with his brother in 2009 and he  
15 failed to explain and produce records of the "hundreds of  
16 thousands of dollars" that Global Automotive alleged Salehi used  
17 in 2010 for start up of a dealership with Omar Casas called Coast  
18 to Coast. Global Automotive, however, did not specifically argue  
19 or identify prepetition assets that Salehi personally owned for  
20 which he failed to account. It also asserted, as fact, that  
21 Salehi committed perjury: (1) by not disclosing in his schedules  
22 money and income that he must have had to be able to invest in  
23 the new dealership and to pay his own living expenses; and (2) at  
24 his Rule 2004 examination as to the disposition of hundreds of  
25 thousands of dollars from liquidation in 2009 of vehicles owned  
26 by a prior dealership.

27 Global Automotive supported the MSJ with its attorney's  
28 declaration ("Counsel's Declaration") and a Separate Statement of

1 Undisputed Facts. Exhibits to Counsel's Declaration consisted  
2 of: (1) a copy of a subpoena to Salehi for the Rule 2004  
3 examination with a document request; (2) excerpts of Salehi's  
4 Rule 2004 examination testimony; (3) excerpts of the November 30,  
5 2011 deposition of Silva M. Maadarani (Salehi's ex-spouse) in  
6 case no. 34-2008-00009041 titled Tanl Investment Group, Inc. v.  
7 Fulton Auto Depot, LLC, et al. in California Superior Court in  
8 Sacramento County ("2008 State Court Action"); (4) a copy of a  
9 subpoena to The Golden 1 Credit Union for business records in  
10 case number 34-2010-00091338 in Superior Court in Sacramento  
11 County ("2010 State Court Action"), titled Global Automotive,  
12 Inc. and TANL Investment Group, Inc. v. Anosheh Satvat, et al.  
13 ("Credit Union Subpoena"); and (5) copies of six checks produced  
14 in response to the Credit Union Subpoena, none of which was  
15 issued to or remitted by Salehi.

16 In its Separate Statement of Undisputed Facts, Global  
17 Automotive listed six paragraphs of "Undisputed Facts," supported  
18 solely by Counsel's Declaration. Two paragraphs consist of the  
19 following: "[Salehi] produced almost no documents at all [at the  
20 Rule 2004 examination]" (Adv. ECF #21 at 1); and "[Salehi] hid  
21 the proceeds of the SAP vehicles in his mother's deposit account,  
22 which proceeds were then used for the Coast to Coast dealership."  
23 Adv. ECF #21 at 2. Global Automotive phrased the balance of  
24 undisputed facts as "claims" made by Salehi, apparently during  
25 the Rule 2004 examination:

26 [Salehi] [ ] claimed he had no documents pertaining to the  
27 disposition of about 60 or so automobiles owned by Fulton  
28 Auto Depot, Inc. dba Sacramento Auto Plaza ("SAP"), a car  
dealership he owned with his brother.

1 [He] claimed not to know where any of the records of SAP  
2 were located.

3 [He] claimed to have no banking records whatsoever.

4 [He] claimed to be "borrowing" funds for living expenses,  
5 but refused to state the name of the lender.

6 [He] claimed to have provided no capital to a dealership by  
7 the name of Coast to Coast with which he was working.

8 Id.

9 Salehi opposed the MSJ and filed his declaration,<sup>4</sup> but he  
10 did not file a responsive statement of undisputed facts. He  
11 included a list of documents that he testified he provided  
12 (through his now-deceased prior counsel) before the Rule 2004  
13 examination. He argued that these documents were sufficient,  
14 considering that he had not been a part of the business at issue  
15 for six years - since October 31, 2006. He declared that he had  
16 no additional documents for Sacramento Auto Plaza because a third  
17 party, Amir Razavi, was the business manager and responsible for  
18 maintaining the records. He further argues that he was merely  
19 the sales manager, although he omits this assertion from his  
20 sworn statement. Moreover, Salehi testified that his brother  
21 oversaw Salehi's business during 2008 and 2009, when Salehi  
22 himself was in an immigration detention center.

23 Salehi stated that he had answered questions to the best of  
24 his ability at the Rule 2004 examination and did not commit  
25 perjury. He argued further that he produced documents at the

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26 <sup>4</sup> Salehi was represented by counsel when he filed his  
27 answer, however, his counsel passed away prior to Global  
28 Automotive's filing of its MSJ. Salehi's new counsel substituted  
into the adversary proceeding shortly after filing Salehi's  
documents in response to the MSJ.

1 Rule 2004 examination and that this created a genuine dispute as  
2 to a material fact. Salehi did not specifically address the  
3 § 727(a)(5) claim in his opposition, but Global Automotive,  
4 similarly, did not include § 727(a)(5) assertions in the MSJ  
5 itself.

6 The bankruptcy court held a hearing on the MSJ. Only  
7 counsel for Global Automotive appeared. In its Disposition After  
8 Oral Argument (formerly its Tentative Ruling), the bankruptcy  
9 court granted summary judgment on the § 727(a)(3) and (a)(5)  
10 claims, but denied it as to the § 727(a)(4)(A) claim.<sup>5</sup>

11 The bankruptcy court found it to be undisputed that Salehi  
12 failed to produce "business records pertaining to the disposition  
13 of approximately sixty (60) automobiles owned by Fulton Auto  
14 Depot Inc., dba Sacramento Auto Plaza ("SAP"), a corporation  
15 [Salehi] owned with his brother and failed to produce his own  
16 personal banking records." Civil Minutes (Feb. 19, 2013) (Adv.  
17 ECF #34). It found that Salehi admitted he "did not have the  
18 requested documents and did not know where to locate such  
19 documents, and offered no justification for his failure to keep  
20 and preserve such documents and records." Id.

21 The bankruptcy court cited the following as evidence of  
22 undisputed facts: Salehi's testimony under oath that he did not  
23 contribute capital to Coast to Coast Motors; the deposition  
24 testimony of Salehi's ex-spouse in the 2008 State Court Action  
25 that proceeds of automobiles sold by Sacramento Auto Plaza were

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27 <sup>5</sup> The record does not contain a transcript of the MSJ  
28 hearing. The bankruptcy court docketed the Disposition After  
Oral Argument as its Civil Minutes of the hearing.

1 transferred to Salehi's mother's account(s) and later used by  
2 Salehi to purchase inventory to be sold by Coast to Coast Motors;  
3 a copy of a cashier's check purchased by Sacramento Auto Plaza  
4 and made payable to Salehi's mother, Anosheh Satvat<sup>6</sup>; and copies  
5 of checks from The Golden 1 Credit Union remitted by Salehi's  
6 mother to Coast to Coast Motors.

7 Specifically as to § 727(a)(3), the bankruptcy court found  
8 the evidence showed that Salehi: was "a co-owner in a business  
9 that maintained substantial assets"; "failed to preserve any  
10 records related to the business"; and "failed to keep or preserve  
11 his own personal banking account information." Id.

12 As to § 727(a)(5), the bankruptcy court found that Salehi  
13 "failed to satisfactorily explain the disposition of the proceeds  
14 of the sale of vehicles by SAP" and that Salehi caused such  
15 proceeds "to be transferred to Anosheh Satvat and then to Coast  
16 to Coast Motors for his own personal purposes." Id.

17 The bankruptcy court determined that it could not rule in  
18 Global Automotive's favor on the § 727(a)(4)(A) claim, because  
19 the testimony as to whether Salehi knowingly and fraudulently  
20 made a false oath or statement was in conflict. The bankruptcy  
21 court recognized that Salehi's testimony regarding the  
22 "disposition of proceeds from the sale of vehicles by SAP  
23 conflict[ed] with the testimony of his ex-spouse Silva  
24 Maadarani." Id.

25 Thereafter, Global Automotive obtained approval to amend its  
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27 <sup>6</sup> Global Automotive's counsel and Salehi's ex-wife provided  
28 declaratory and deposition testimony, respectively, that Anosheh  
Satvat is Salehi's mother; a fact not disputed by Salehi.



1 complaint to omit its claim under § 727(a)(4)(A) and amended the  
2 complaint accordingly. The bankruptcy court then entered a  
3 judgment denying Salehi's discharge under § 727(a)(3) and (a)(5)  
4 on March 25, 2013, and Salehi timely appealed.

#### 5 JURISDICTION

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
7 §§ 1334 and 157(b)(2)(J). We have jurisdiction under 28 U.S.C.  
8 § 158.

#### 9 ISSUES

10 1. Did the bankruptcy court err when it granted summary  
11 judgment and denied Salehi's discharge under § 727(a)(5)?

12 2. Did the bankruptcy court err when it granted summary  
13 judgment and denied Salehi's discharge under § 727(a)(3)?

#### 14 STANDARD OF REVIEW

15 We review a summary judgment de novo. Bamonte v. City of  
16 Mesa, 598 F.3d 1217, 1220 (9th Cir. 2010). De novo review  
17 requires that we consider a matter afresh, as if no decision had  
18 been rendered previously. United States v. Silverman, 861 F.2d  
19 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee  
20 (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008). Viewing  
21 the evidence in the light most favorable to the non-moving party,  
22 we must determine whether there are any genuine disputes of  
23 material fact that remain for trial and whether the prevailing  
24 party is entitled to judgment as a matter of law. New Falls  
25 Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th Cir.  
26 BAP 2007).

#### 27 DISCUSSION

28 "[A] party seeking summary judgment always bears the initial

1 responsibility of informing the [trial] court of the basis for  
2 its motion, and identifying those portions of the pleadings,  
3 depositions, answers to interrogatories, and admissions on file,  
4 together with the affidavits, if any, which it believes  
5 demonstrate the absence of a genuine [dispute] of material fact.”  
6 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal  
7 quotation marks omitted).

8 A claim for denial of a discharge under § 727 is construed  
9 liberally in favor of the discharge and strictly against the  
10 objector. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th  
11 Cir. 2010). A creditor who asks the court to deny a debtor a  
12 discharge bears the burden of proving each of the elements of the  
13 applicable provision. Id. Thus, our review here is necessarily  
14 technical and focuses on whether Global Automotive presented  
15 undisputed evidence as to each element of each of its claims for  
16 denial of discharge.<sup>7</sup> Both in its papers and at oral argument  
17 Global Automotive argued very broadly and, in so doing, failed to  
18 carry its heavy burden on summary judgment.

19 **A. Global Automotive failed to argue or support denial of**  
20 **Salehi’s discharge under § 727(a) (5) .**

21 Section 727(a) (5) provides that the court shall grant the  
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23 <sup>7</sup> At oral argument, Global Automotive’s counsel argued that  
24 Salehi’s failure to comply with a Local Bankruptcy Rule that  
25 required him to file a responsive statement of undisputed facts  
26 must be viewed as conceding the lack of disputed facts. We  
27 disagree. Even a complete lack of opposition to a motion for  
28 summary judgment does not relieve the moving party of its  
obligation to meet its burden of showing entitlement to judgment  
as a matter of law. See North Slope Borough v. Rogstad  
(In re Rogstad), 126 F.3d 1224, 1227 (9th Cir. 1997) (it is error  
to grant summary judgment simply because the opponent failed to  
oppose).

1 debtor a discharge, unless - "the debtor has failed to explain  
2 satisfactorily, before determination of denial of discharge under  
3 this paragraph, any loss of assets or deficiency of assets to  
4 meet the debtor's liabilities; . . . ." The objector must first  
5 prove a disappearance of substantial assets, then the burden  
6 shifts to the debtor to explain. Kistler v. Fader (In re Fader),  
7 414 B.R. 640, 645 (Bankr. N.D. Cal 2009) (citing Chalik v.  
8 Moorfield (In re Chalik), 748 F.2d 616 (11th Cir. 1984)).

9 Here, Global Automotive alleged in its complaint that Salehi  
10 failed to explain "where tens of thousands of dollars of proceeds  
11 of automobiles owned by [Salehi's] corporation, Fulton Auto  
12 Depot, Inc. dba Sacramento Auto Plaza ('SAP') were expended."  
13 Adv. ECF #1 at 2. In its MSJ, however, Global Automotive does  
14 not pursue relief based on this allegation. In fact, the MSJ  
15 contains no specific argument directed to denial of discharge  
16 under § 727(a)(5); it merely recites § 727(a)(5) as grounds for  
17 relief.

18 On appeal, Salehi argues that Global Automotive made no  
19 evidentiary showing that Salehi controlled any funds or  
20 transferred them to his mother and, thus, failed to carry its  
21 burden on summary judgment.<sup>8</sup> Global Automotive argues in  
22 response that Salehi's failure to dispute the request for relief  
23 under § 727(a)(5) in his opposition to the MSJ bars Salehi's  
24 argument against such relief on appeal. We disagree. As Global

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25  
26 <sup>8</sup> Salehi also argues on appeal that all the checks offered  
27 by Global Automotive were generated during the period of time  
28 that Salehi was in immigration detention. As Global Automotive  
points out in its Responsive Brief on appeal, this argument is  
not supported by the record. We, thus, do not consider it in our  
analysis.

1 Automotive failed to specifically address § 727(a)(5) in its MSJ,  
2 Salehi had no obligation to respond. And even absent opposition,  
3 Global Automotive failed to carry its burden on summary judgment.  
4 See North Slope, 126 F.3d at 1227. Global Automotive was  
5 required to clearly identify the elements required to establish  
6 its claim under § 727(a)(5) and to tie each to the evidence. The  
7 record shows that it did not do so.

8 As a threshold issue under § 727(a)(5), Global Automotive  
9 failed to argue or establish that "debtor at one time, not too  
10 remote from the bankruptcy petition date, owned identifiable  
11 assets." See In re Retz, 606 F.3d at 1205 (quoting Olympic Coast  
12 Invest., Inc. v. Wright (In re Wright), 364 B.R. 51, 79 (Bankr.  
13 D. Mont. 2007)). Global Automotive's submission of a copy of a  
14 cashier's check remitted by Fulton Auto Depot, Inc. in 2009 and  
15 made payable to Anosheh Satvat's account and copies of checks  
16 issued out of Anosheh Satvat's account to Coast to Coast in 2010,  
17 on their face, fail to establish that any funds represented  
18 thereby were either Salehi's assets or assets controlled by  
19 Salehi. Global Automotive offered nothing else to support such  
20 an argument or finding.

21 Global Automotive generally asserted that Salehi held an  
22 ownership interest in Fulton Auto Depot, Inc. dba Sacramento Auto  
23 Plaza with his brother. And Global Automotive's counsel argued  
24 that Salehi failed to produce records relating to the  
25 dispositions of "60 or so" Sacramento Auto Plaza vehicles, thus  
26 implying that Salehi was somehow responsible for their  
27 disposition. None of the cited excerpts from Salehi's Rule 2004  
28 examination testimony, however, support this implication; and

1 Global Automotive fails to argue when such dispositions allegedly  
2 occurred. Salehi provided declaratory evidence that he had not  
3 been a partner in Sacramento Auto Plaza<sup>9</sup> for six years; that is  
4 since 2006. The existence and disposition of "60 or so" vehicles  
5 (at some unknown point in time) are not established by the mere  
6 statements of counsel, even when echoed in Global Automotive's  
7 Separate Statement of Undisputed Facts. As to timing, which was  
8 not addressed in the MSJ, Salehi testified at his Rule 2004  
9 examination that he was subject to immigration detention for a  
10 period of time and, thus, was incapable of active involvement in  
11 vehicle sales. In his declaration he testified that his  
12 detention was in 2008 and 2009. He was released in April 2009,  
13 three months before Sacramento Auto Plaza ceased business  
14 entirely, which, significantly, was three years before Salehi  
15 filed bankruptcy. Thus, Global Automotive fails to establish an  
16 absence of disputed material facts: the existence of substantial  
17 assets not too remote in time from the 2012 petition date.

18 Nor can we discern from the record that Salehi himself ever  
19 owned or disposed of "60 or so" vehicles at any point in time.  
20 Salehi's bankruptcy schedules, filed under penalty of perjury,  
21 disclose that his sole source of income in the two years pre-

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22 <sup>9</sup> The offered evidence and argument made by both sides  
23 regarding Sacramento Auto Plaza itself are ambiguous at best. It  
24 appears possible that the dba was initially used by either a  
25 partnership or a limited liability company and later by a  
26 corporate entity. Neither side presented evidence of the  
27 ownership or structure to resolve this ambiguity. And other than  
28 Salehi's testimony that Sacramento Auto Plaza ceased business in  
July 2009, Global Automotive presented no evidence to provide any  
temporal reference points in connection with the alleged  
disposition of "60 or so" automobiles. And it bears repeating,  
Global Automotive presented no evidence of any specific vehicles,  
much less "60 or so" vehicles.

1 filing was unemployment benefits. The excerpts of Salehi's  
2 Rule 2004 examination testimony are consistent on this point. He  
3 testified that Sacramento Auto Plaza closed down in July 2009,  
4 nearly three years before he filed bankruptcy, and that he had no  
5 idea what happened to proceeds of any vehicles from Sacramento  
6 Auto Plaza.

7 The bankruptcy court found, in connection with its grant of  
8 summary judgment under § 727(a)(5), that Salehi caused the  
9 proceeds of the sale of vehicles "to be transferred to Anosheh  
10 Satvat and then to Coast to Coast Motors for his own personal  
11 purposes." Civil Minutes (Feb. 19, 2013) at 2. To make this  
12 finding the bankruptcy court necessarily had to determine that  
13 Salehi's testimony to the contrary was not credible and, instead,  
14 give credit to Salehi's ex-spouse's testimony.<sup>10</sup> In addition,  
15 the bankruptcy court had to make an adverse inference based on  
16 Global Automotive's unsupported argument, that Salehi controlled  
17 both Sacramento Auto Plaza and Coast to Coast Motors. Both the  
18 credibility determination and the adverse inference were  
19 inappropriately made on summary judgment.<sup>11</sup> See Oswalt v.  
20 Resolute Indus., 642 F.3d 856, 861 (9th Cir. 2011) ("Credibility  
21 determinations, the weighing of the evidence, and the drawing of  
22 legitimate inferences from the facts' are inappropriate at the  
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24 <sup>10</sup> The bankruptcy court found the testimony in connection  
25 with Global Automotive's § 727(a)(4)(A) claim in conflict, thus  
26 requiring denial of summary judgment. This conflicting testimony  
likewise failed to support summary judgment under § 727(a)(5).

27 <sup>11</sup> The scant evidence submitted by Global Automotive was  
28 open to possible evidentiary objections; Salehi, however, did not  
make any and we do not consider evidentiary objections that were  
not preserved.

1 summary judgment stage.") (internal citation omitted). Thus, the  
2 bankruptcy court erred - Global Automotive was not entitled to  
3 summary judgment under § 727(a)(5) - and we must reverse.

4 **B. The bankruptcy court erred by granting summary judgment to**  
5 **Global Automotive under § 727(a)(3).**

6 Section 727(a)(3) provides, in relevant part, that a debtor  
7 is not entitled to a discharge if he fails "to keep or preserve  
8 any recorded information, including books, documents, records,  
9 and papers, from which the debtor's financial condition or  
10 business transactions might be ascertained, unless such act or  
11 failure to act was justified under all of the circumstances of  
12 the case." To succeed on its objection to discharge under  
13 § 727(a)(3), Global Automotive must show "(1) that [Salehi]  
14 failed to maintain and preserve adequate records, and (2) that  
15 such failure makes it impossible to ascertain [Salehi's]  
16 financial condition and material business transactions.'" *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1296 (9th Cir. 1994)  
17 (quoting *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir.  
18 1992)). Adequate records should enable creditors to follow a  
19 debtor's transactions "for a reasonable period in the past."  
20 *Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva)*,  
21 550 F.3d 755, 761 (9th Cir. 2008) (quoting *Rhoades v. Wikle*,  
22 453 F.2d 51, 53 (9th Cir. 1971)).

24 Here, Global Automotive argued that Salehi admitted that he  
25 kept no financial records and failed to maintain records for  
26 Sacramento Auto Plaza. It also argued that Salehi could not  
27 produce records pertaining to his investment in 2010 in the Coast  
28 to Coast dealership. To find in Global Automotive's favor on

1 these points would require us to accept counsel's argument as  
2 fact and make inferences and credibility determinations in Global  
3 Automotive's favor - none of which is appropriate on summary  
4 judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255  
5 (1986) (all justifiable inferences must be drawn in favor of the  
6 non-moving party); Oswalt v. Resolute Indus., 642 F.3d at 861  
7 (credibility determinations, weighing of evidence, and the  
8 drawing of legitimate inferences from the facts are inappropriate  
9 on summary judgment); and British Airways Bd. v. Boeing Co.,  
10 585 F.2d 946, 952 (9th Cir. 1978) ("Legal memoranda and oral  
11 argument are not evidence"). And, the nonmovant's "evidence is  
12 to be believed." McSherry v. City of Long Beach, 584 F.3d 1129,  
13 1133 (9th Cir. 2009).

14 **1. Sacramento Auto Plaza business records**

15 During Salehi's Rule 2004 examination, he testified that he  
16 did not know the location of business records for Sacramento Auto  
17 Plaza. Global Automotive implicitly argues that Salehi not only  
18 should know where the records were, presumably based on his  
19 alleged ownership interest in Sacramento Auto Plaza, but that he  
20 should have produced them in advance of the Rule 2004  
21 examination; and, it then asserts that, having failed on both  
22 accounts, he should not be entitled to a discharge.

23 First, as discussed above, Global Automotive failed to  
24 establish that Salehi recently held any ownership interest in  
25 Sacramento Auto Plaza entitling him to access to, or  
26 responsibility for, Sacramento Auto Plaza's business records.  
27 Second, the only evidence in the record reflects that Sacramento  
28 Auto Plaza ceased operating nearly three years before Salehi



1 filed bankruptcy. Third, Salehi testified at his Rule 2004  
2 examination that "Amir was in charge for all that stuff, . . . ."  
3 Depo. Tr. (June 5, 2012) at 26:22-24 (Adv. ECF #20). And in his  
4 declaration in opposition to the MSJ, Salehi expanded on this  
5 point when he testified that Amir Razavi "made and maintained all  
6 business records for Sacramento Auto Plaza." Adv. ECF #28 at  
7 2:10-11. Global Automotive offered only excerpts of Salehi's  
8 Rule 2004 examination testimony as evidence on these points; and  
9 as the non-moving party on summary judgment, Salehi was entitled  
10 to have his evidence and Rule 2004 examination testimony  
11 believed.

12 Global Automotive next argues that Salehi's argument  
13 regarding control of Sacramento Auto Plaza's documents conflicted  
14 with Salehi's Rule 2004 examination testimony that he did not  
15 know where Sacramento Auto Plaza's business documents were. We  
16 disagree. In Salehi's Rule 2004 examination testimony he stated  
17 that he did not know what happened to the records and that Amir  
18 Razavi was in charge of the business records. Salehi's  
19 statements were not facially inconsistent. Thus, Global  
20 Automotive did not establish the absence of a genuine dispute of  
21 material fact necessary to support judgment under § 727(a)(3)  
22 based on a lack of business records for Sacramento Auto Plaza.

## 23 **2. Coast to Coast automobile dealership records**

24 Global Automotive argued on summary judgment that Salehi's  
25 discharge should be denied because Salehi lacked records  
26 regarding funds he allegedly used in 2010 to start Coast to  
27 Coast. Global Automotive's evidence consisted solely of Salehi's  
28 Rule 2004 examination testimony and Salehi's ex-wife's deposition

1 testimony in the 2008 State Court Action.

2 Salehi's testimony was that at some point prepetition he  
3 tried to help his friend Omar Casas open a car dealership in  
4 Sacramento called Coast to Coast. He testified that he  
5 contributed no capital and no vehicles; he only contributed his  
6 knowledge to the effort. Coast to Coast itself lasted only a  
7 couple of months.

8 Salehi's ex-wife testified to the contrary, based on  
9 conversations in Farsi that she overheard. She also testified,  
10 however, that she is Lebanese, did not speak Farsi, but had taken  
11 some classes. From such overheard conversations, she testified  
12 that she found out that Salehi put some money in his mother's  
13 account from the sale of Sacramento Auto Plaza vehicles and then  
14 used the funds to help buy cars for Coast to Coast. And she  
15 finally testified that she believed the money went back into  
16 Salehi's mother's account, when Coast to Coast failed, because:  
17 "[w]here else would it go." Depo. Tr. (November 30, 2011) at  
18 34:9 (Adv. ECF #20).

19 The conflicting testimony excerpts presented by Global  
20 Automotive cannot serve as the basis for summary judgment.  
21 Determination of the facts required assessment of the witnesses'  
22 credibility, which, as already stated, is inappropriate on  
23 summary judgment. Therefore, the bankruptcy court erred in  
24 determining the absence of a genuine dispute as required to  
25 support judgment under § 727(a)(3) based on lack of records for  
26 Coast to Coast.

### 27 **3. Debtor's personal financial records**

28 Global Automotive also argued that Salehi should be denied

1 his discharge because he produced no personal banking records for  
2 his Rule 2004 examination and admitted to keeping no records. It  
3 is undisputed that Salehi was unemployed when he filed bankruptcy  
4 and had been unemployed the two years prior to filing. Global  
5 Automotive argued in its MSJ, however, that it was implausible  
6 that Salehi could have no income for over a year but still pay  
7 personal expenses, and implicitly that Salehi, thus, must have  
8 banking records.

9       Again, the only evidence offered by Global Automotive  
10 consists of Salehi's Rule 2004 examination testimony in which he  
11 testified that he went to Bank of America to obtain his bank  
12 statement, obtained a copy of it, but did not bring it to the  
13 Rule 2004 examination because it was negative for the prior two  
14 to three years. He also testified that he had a second account  
15 at Bank of America that was set up for direct deposit of his  
16 unemployment benefits, accessible with an ATM card. He alleged,  
17 however, that he never received any written statements on either  
18 account and did not write checks. He also testified that he  
19 either paid cash on his few monthly bills, like his cell phone,  
20 or paid using a friend's credit card and that he lived with his  
21 parents.

22       A debtor must only "present sufficient written evidence  
23 which will enable his creditors reasonably to ascertain his  
24 present financial condition and to follow his business  
25 transactions for a reasonable period in the past." In re Caneva,  
26 550 F.3d at 761. A debtor's "duty to keep records is measured by  
27 what is necessary to ascertain [his] financial status." Moffett  
28 v. Union Bank, 378 F.2d 10, 11 (9th Cir. 1967); see also United

1 States Tr. v. Hong Minh Tran (In re Hong Minh Tran), 464 B.R.  
2 885, 893 (Bankr. S.D. Cal. 2012) (type of debtor, as well as  
3 debtor's sophistication, informs the bankruptcy court's  
4 determination). Here, Global Automotive does not argue that  
5 Salehi had no banking records. Instead, it implicitly argues  
6 that Salehi had no hard copies of bank records or, at best, that  
7 he failed to produce any at his Rule 2004 examination. Salehi's  
8 undisputed testimony, if believed (as it must be on summary  
9 judgment), is consistent with electronic access to paperless  
10 accounts, one set up for automatic deposit of unemployment  
11 benefit payments, and the foregoing of paper records in this era  
12 of electronic accessibility.

13 Moreover, failure to produce documents in response to a  
14 discovery request, alone, does not justify denial of discharge  
15 under § 727(a)(3). Global Automotive could have obtained written  
16 copies of Salehi's bank records through formal discovery in the  
17 adversary proceeding if it was not satisfied with what Salehi  
18 produced in response to his Rule 2004 examination.

19 Drawing justifiable inferences in favor of Salehi, which we  
20 must on summary judgment, and construing evidence liberally in  
21 favor of the discharge, we determine that the bankruptcy court  
22 erred when it granted summary judgment in favor of Global  
23 Automotive under § 727(a)(3) based on an alleged lack of personal  
24 financial records.

#### 25 **CONCLUSION**

26 Based on the foregoing, we REVERSE the bankruptcy court's  
27 grant of summary judgment.